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International
Criminal Tribunal
for the Former
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Tribunal Pénal
International pour
l'ex-Yougoslavie

The International Criminal Tribunal for the former Yugoslavia presents its compliments to the Embassy of the United States of America to The Netherlands and has the honour to transmit to the embassy a certified copy of the following **public** document filed in the case *The Prosecutor v. Radovan Karadžić* (Case No. IT-95-5/18-T):

- **Decision on the Accused's Third Motion for Binding Order (United States of America)**, filed on 17 February 2011.

The International Tribunal avails itself of this opportunity to renew to the Embassy of the United States of America the assurances of its highest consideration.

The Hague, 18 February 2011



The Embassy of the United States of America,
The Hague,
The Netherlands.

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International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-95-5/18-T

Date: 17 February 2011

Original: English

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **17 February 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE ACCUSED'S THIRD MOTION FOR BINDING ORDER
(UNITED STATES OF AMERICA)**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

**The Government of the
United States of America**

via the Embassy of the United
States of America to
The Netherlands, The Hague

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey



THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of the Accused's "Third Motion for Binding Order: United States of America", filed on 24 January 2011 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion the Accused requests the Trial Chamber to issue a binding order to the United States of America ("U.S.") pursuant to Article 29 of the Statute of the Tribunal ("Statute") and Rule 54 *bis* of its Rules of Procedure and Evidence ("Rules"), requiring the U.S. to provide him with the following documents:

All reports or memorandum of investigation and interviews conducted by the Department of Defence, National Security Council, or Central Intelligence Agency concerning the delivery of arms, ammunition, or military equipment by air to Tuzla in February – March 1995.¹

2. The Accused submits that the Motion meets the requirements of Rule 54 *bis* because "his request is specific, calls for relevant and necessary documents, and he took steps to obtain the assistance of the United States before filing the Motion".² With regard to the relevance and necessity requirements for the issuance of binding orders, the Accused submits that the Trial Chamber has already ruled "that evidence of the very arms smuggling incidents involving Tuzla" is relevant and necessary for his defence.³

3. The Accused submits that the Motion also meets the specificity requirement for the issuance of a binding order because he has narrowed his request to specific documents which "he has identified as being in existence and in the possession of the United States".⁴ Further, the Accused submits that he has made extensive efforts to obtain the material voluntarily from the U.S. over the past 18 months but that the U.S. has failed to furnish the documents he has requested.⁵

4. Following an invitation issued by the Trial Chamber to respond to the Motion,⁶ the U.S. filed its "Response of the United States of America to the Trial Chamber's 27 January 2011

¹ Motion, para. 1.

² Motion, para. 27.

³ Motion, para. 30, citing Decision on Accused's Application for Binding Order Pursuant to Rule 54 *bis* (Federal Republic of Germany), 19 May 2010, paras. 34-35, Judge Kwon dissenting.

⁴ Motion, paras. 29-30.

⁵ Motion, para. 35.

⁶ See Invitation to the United States of America, 27 January 2011.

‘Invitation to the United States of America’’ (“Response”) arguing that the Motion should be denied.⁷ The U.S. submits that it has been working “cooperatively and continuously” with the Accused, it has “gone to extraordinary efforts since first receiving Accused’s information requests to locate, to declassify as necessary, and to provide potentially responsive material”, and that it has told the Accused that the final potentially responsive document is with a third party for review.⁸ The U.S. submits that this final document contains material classified by a “third party” for the protection of its security interests and potentially a “fourth party” as well. Thus, the U.S. is not in a position to unilaterally declassify sensitive information that it does not own or did not originate.⁹ However, the U.S. states that it understands that the third party in question is making efforts to complete its review as soon as possible and that the U.S. has contacted the potential fourth party to request an expedited review.¹⁰

II. Applicable Law

5. Article 29 of the Statute obliges states to “co-operate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law”. This obligation includes the specific duty to “comply without undue delay with any request for assistance or an order issued by a Trial Chamber [for] [...] the service of documents”.¹¹

6. A party seeking an order under Rule 54 *bis* must satisfy a number of general requirements before such an order can be issued, namely: (i) the request for the production of documents under Rule 54 *bis* should identify specific documents and not broad categories of documents;¹² (ii) the requested documents must be “relevant to any matter in issue” and “necessary for a fair determination of that matter” before a Chamber can issue an order for their production;¹³ (iii) the applicant must show that he made a reasonable effort to persuade the state

⁷ Response, p. 1.

⁸ Response, pp. 1, 3.

⁹ Response, p. 3.

¹⁰ Response, p. 3.

¹¹ Article 29(2)(c) of the Statute.

¹² *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108bis.2, Decision on Request of the United States of America for Review, 12 May 2006 (“Milutinović US Decision”), paras. 14–15; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of Trial Chamber II of 18 July 1997, 29 October 1997 (“Blaškić Review”), para. 32; *Prosecutor v. Kordić and Čerkez*, Decision on the Request of the Republic of Croatia for Review of a Binding Order, Case No. IT-95-14/2-AR108bis, 9 September 1999 (“Kordić Decision”), paras. 38–39.

¹³ Rule 54 *bis* (A) (ii) of the Rules; *Blaškić Review*, paras. 31, 32(ii); *Kordić Decision*, para. 40; *Milutinović US Decision*, paras. 21, 23, 25, 27.

to provide the requested information voluntarily;¹⁴ and (iv) the request cannot be unduly onerous upon the state.¹⁵

7. With respect to (iii) above, the applicant cannot request an order for the production of documents without having first approached the state said to possess them. Rule 54 *bis* (A) (iii) requires the applicant to explain the steps that have been taken to secure the state's co-operation. The implicit obligation is to demonstrate that, prior to seeking an order from the Trial Chamber, the applicant made a reasonable effort to persuade the state to provide the requested information voluntarily.¹⁶ Thus, only after a state declines to lend the requested support should a party make a request for a Trial Chamber to take mandatory action under Article 29 and Rule 54 *bis*.¹⁷

III. Discussion

8. As stated above, binding orders can be issued only after the applicant has made reasonable efforts to persuade the state concerned to provide the requested information voluntarily, and then the state has refused to do so.¹⁸ In the present circumstances, the Chamber is satisfied that the U.S. has continuously co-operated with the Accused's requests since his original binding order motion of 11 September 2009.¹⁹ The Accused even submits that during the past year, the U.S. has been working diligently to resolve the issues relating to his numerous requests and the process has resulted in the production of "218 documents by the United States and the withdrawal or narrowing of many of Dr. Karadzic's requests".²⁰

9. For this particular request, the U.S. notified the Accused that it found a potentially relevant document and is currently waiting for security clearance from the "third" and potentially "fourth party".²¹ The U.S. submits that as soon as it receives responses from these parties, it will notify the Accused accordingly. The Chamber trusts that the U.S. will continue its diligent efforts to resolve this matter directly with the Accused as quickly as possible. Given that the U.S. is co-operating with the Accused for the production of the requested documents, and that it is in the interests of all parties involved that requests for documents are, if possible,

¹⁴ Rule 54 *bis* (A) (iii) of the Rules; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Sreten Lukic Amended Rule 54 *bis* Application, 29 September 2006 ("Sreten Lukic Decision"), para.7.

¹⁵ Blaškić Review, para. 32 (iii); Kordić Decision, para. 41.

¹⁶ Sreten Lukic Decision, para.7.

¹⁷ Milutinović US Decision, para. 32.

¹⁸ Milutinović US Decision, para. 32.

¹⁹ See Decision on the Accused's Application for Binding Order Pursuant to Rule 54 *bis* (United States of America), 12 October 2009, para. 11.

²⁰ Motion, para. 22.

²¹ Response, p. 3.

dealt with on a voluntary basis, the Chamber considers that the Accused's Motion must fail on this basis alone.

IV. Disposition

10. For the reasons outlined above, the Trial Chamber, pursuant to Article 29 of the Statute, and Rules 54 and 54 *bis* of the Rules, hereby **DENIES** the Motion.

Done in English and French, the English text being authoritative.



Judge O-Gon Kwon
Presiding

Dated this seventeenth day of February 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

